

## WHO SHOULD APPLY FOR A DISCHARGE PERMIT?

Under the Clean Water Act (CWA), it is unlawful to *discharge pollutants* through a *point source* into a *water of the United States* without a permit issued under the National Pollutant Discharge Elimination System (NPDES). Concentrated animal feeding operations (CAFOs) are point sources, as defined by the CWA [Section 502(14)]. Therefore, anyone operating a CAFO that discharges pollutants other than *agricultural stormwater* is required to apply for an NPDES permit.

A permit is essentially a license that grants permission for an owner or operator of a facility to do something that would be illegal without the permit. An NPDES permit allows a facility to discharge pollutants as long as the owner or operator complies with specific conditions defined in the permit. The renewal Order for CAFOs in the Colorado River Basin Region is an NPDES permit.

Generally, it is a CAFO owner or operator's responsibility to decide whether or not to seek coverage under the renewal Order based on whether the CAFO discharges. This is how the NPDES program operates for other point sources.

Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit. Application for permit coverage does not authorize a discharge. Owners or operators that discharge should apply for NPDES permit coverage early enough so that permit coverage will be authorized by the time the CAFO discharges.

### What are the benefits of applying for a permit?

Because discharges from unpermitted CAFOs are prohibited, NPDES permit coverage reduces a CAFO operator's risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the CWA. Compliance with the permit is deemed compliance with the CWA and thus acts as a shield against enforcement or citizen suits.

The renewal Order for CAFOs in California's Colorado River Basin Region will continue to allow CAFOs to discharge when precipitation causes an overflow from a structure that is properly designed, constructed, operated, and maintained. Minimum standards for proper design, construction, operation, and maintenance will be included in the Order. The Order will also contain upset provisions that can protect enrollees from legal liability when emergencies or natural disasters cause discharges beyond the enrollee's reasonable control. In order to be covered the CAFO has to be in compliance with all permit requirements. This protection is not available to unpermitted CAFOs.

An **agricultural stormwater** discharge is a precipitation-related discharge of manure, litter, or process wastewater from a land application area where certain site-specific nutrient management practices have been implemented, including:

- Conservation practices to control nutrient runoff;
- Appropriate manure and soil testing;
- Land application at agronomic rates; and,
- Documentation that the above practices have been implemented.

A **discharge**, in general, is the flow of treated or untreated wastewater from a facility to surface water.

A **point source** discharger is an operation that discharges pollutants from a discrete conveyance directly into waters of the United States.

The term **pollutant** includes a wide variety of materials that might contaminate waters of the U.S. Pollutants from CAFOs might include nutrients, suspended solids, oxygen-demanding substances, or pathogens.

The term **waters of the United States** is defined at 40 CFR 122.2, and includes, but is not limited to

- Interstate waters and waters used for interstate or foreign commerce or for recreation by interstate or foreign travelers.
- Waters from which fish or shellfish are taken to be sold in other states or countries.
- Waters used by industries involved in interstate commerce.
- Tributaries and impoundments or dams of any waters described above.
- Territorial seas.
- Wetlands adjacent to any waters described above.

## What are the penalties for discharging without a permit?

The owner or operator of a CAFO that fails to obtain an NPDES permit and has a discharge is subject to State or federal enforcement, as well as liability from citizen suits. An unpermitted facility with a discharge would be in violation of the CWA prohibition against discharging without an NPDES permit (33 U.S.C. 1311(a)).

Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit.

The U.S. Environmental Protection Agency or the Colorado River Basin Regional Water Quality Control Board may issue an enforcement order to any person or company who violates the Clean Water Act. The order may impose a civil penalty plus recovery of any economic benefit of noncompliance and may also require correction of the violation.

### Clean Water Act Enforcement

Under Section 309 of the CWA, penalties for violating the permit or not having a permit to discharge into waters of the U.S. may be up to \$27,500 per violation per day. Under CWA Section 311, a Class I penalty may be assessed in an amount of up to \$10,000 per violation, not to exceed \$25,000; a Class II penalty may be assessed in an amount of up to \$10,000 per day per violation, but not to exceed \$125,000.

### California Water Code Enforcement

*Section 13261:* Up to \$1,000 per day for failure to furnish reports of waste discharge or failure to pay annual program fees. (\$5,000 per day for non-NPDES discharges if hazardous waste is involved and there is a willful violation.)

*Section 13265:* Up to \$1,000 per day for discharging without a permit. (\$5,000 per day for non-NPDES discharges if hazardous waste is involved and violation is due to negligence.)

*Section 13268:* Up to \$1,000 per day for failing or refusing to furnish technical or monitoring reports or falsifying information therein. (Up to \$5,000 per day for non-NPDES discharges if hazardous waste is involved and there is a knowing violation.)

*Section 13271:* Up to \$20,000 for failing to notify the Office of Emergency Services (OES) of a discharge of hazardous substances that exceeds the reportable quantity or more than 1000 gallons of sewage.

*Section 13385 (a):* For NPDES permit program violations or discharges to surface water: Up to \$10,000 per day of violation plus an additional liability of \$10 per gallon for each gallon over 1,000 gallons where there is a discharge that is not cleaned up. A "discharge" as used in this section is defined as any discharge from a point source to navigable waters of the United States, any introduction of pollutants into a POTW, or any use or disposal of sewage sludge.